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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 412

MARGARET SHIELDS, AND HENRY K. SHIELDS, BY HIS MOTHER AND NEXT FRIEND, MARGARET SHIELDS,
Petitioners,

vs.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION,
Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Margaret Shields and Henry K. Shields, by his mother and next friend, Margaret Shields, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania entered in favor of the respondent.

A. Summary Statement of the Matter Involved

Petitioner, an American merchant seaman, being a minor, the action was brought in the name of his mother as next

friend, and claims to recover damages for personal injuries sustained in the service of the vessel. The suit was predicated, *inter alia*, upon the respondent's failure to provide a safe place and method of work and on the negligence of an independent contractor, imputable to the employer.

Before the incident involved in this case, petitioner had received three months training at Sheepshead Bay in engine room studies, physical training and gunnery, and he served on two oil tankers. His first service on a dry cargo ship commenced on September 20, 1944, when he joined the respondent's steamship "Hannibal Hamlin", in the port of Philadelphia. His first assignment on this vessel was to keep the winches lubricated while they were being used by the longshoremen in hauling cargo aboard (R. 8a). This job was customarily performed by the deck engineer (R. 76a). There were two winches at each watch, one port and one starboard, and each was equipped with a set of controls, including a throttle and brake, which were located at the rear of the winch, so that the winchman in the normal course of operations would be looking over the winch toward the hatch (R. 11a, 75a). The general practice required a team of three longshoremen at each hatch, one at each winch and a signalman at the hatch to direct them (R. 138a). In this case, however, the general practice was not followed and the stevedoring contractor rigged a set of "L" shaped wooden extensions from the throttle on each winch to a point between and in front of the two winches, so that one man could look down into the hatch and operate both extensions at the same time (R. 11a). In this position the operator did not have the brake available to him, since it was on the other side of the winch. The steam necessary for the operation of the winches originated in the engine room and was controlled by three valves; a master valve in the engine room which released the steam to the deck; a deck valve to allow the steam to travel through the deck

line to the winch; and a valve at the throttle which, when opened, set the winch in operation. All three of these valves had to be opened before the winch could be started (R. 121a). Under the general practice the ship's crew opened the master valve in the engine room while the longshoremen handled the two valves on deck (R. 62a, 64a and 65a).

Before starting to oil any of the winches, libellant followed the practice of first notifying the operator to shut the winch off until he had completed the lubrication job (R. 9a). He followed this procedure and lubricated all of the winches about four or five times during each of the first and second days. On the third day petitioner had oiled about three or four sets of winches and when he came to the No. 2 set, the operator, at petitioner's request, stopped the winches and petitioner proceeded to work on the starboard winch which he completed in about five or six minutes (R. 10a). He then crossed over to lubricate the port winch and so notified the operator who said, "o. k." (R. 12a and 13a). He had oiled the inboard side and was engaged in oiling a bearing on the outboard side, and in order to reach it he extended his left hand with the oil can through the opening in the flywheel, when the winch operator, apparently having forgotten petitioner, opened the throttle causing the flywheel to whirl into operation and trapped petitioner's left hand. In attempting to extricate his left hand, petitioner's right hand was also mangled (R. 13a), and the flywheel continued to revolve after the steam was cut off (R. 105a and 106a) because the brake which was normally used to stop the wheel was on the other side of the winch and not available to the operator under the makeshift arrangement.

As a consequence of the accident petitioner's left hand had to be amputated and his right hand permanently impaired.

Petitioner brought suit for damages both against his employer, the respondent here, and against the stevedoring contractor, the employer of the stevedores. In the course of the trial of the case against the stevedore, the parties entered into a settlement for the sum of $30,000.00, whereby the stevedoring company was released from liability, with the express understanding that the settlement was not a full satisfaction of the damage claim and that it was without prejudice to petitioner's right to recover the balance of damages due in his suit against this respondent.

The Opinion of the District Court

The District Judge held that the makeshift controls and the method of operation constituted a dangerous condition, but, since the petitioner could have avoided the accident by closing the deck valve the Court held that respondent did not fail in its duty to provide a safe place.

With respect to the second point the Court said: "There is no such practical need or policy which requires that the shipowner be held responsible for the negligence or misconduct of such longshoremen not employed by him but by an independent contractor and doing work over which he has little if any control."

The Opinion of the Court of Appeals

The Court of Appeals in a divided decision, affirmed the ruling of the District Court. The majority opinion adopts the view of the District Court on the first point but makes no comment with respect to the second point relating to imputed negligence.

Chief Judge Biggs dissented upon the ground that the makeshift controls and method of the operation rendered the place of work unsafe; and the failure of petitioner to close the deck valve did not change the characteristic fea-

tures of the place which both Court had found to be unsafe, but it was simply a circumstance which called for mitigation of damages under the comparative negligence rule. In reaching the conclusion the Chief Judge held the case of *Socony Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, to be squarely in point.

Questions Presented

Two issues are presented to the Court in this petition:

(1) Where the place of work is unsafe but the danger can be avoided by the exercise of a certain precaution, does that fact render the place of work a safe one regardless of whether the precaution is taken, or does the character of the place remain unsafe and the failure to exercise the precaution simply call for the application of the comparative negligence rule?

(2) Where the method of doing the work adopted by the longshoremen had a bearing on the safety of the ship's crew, is the negligence of the longshoremen imputable to the respondent as petitioner's employer?

B. Jurisdictional Statement

(a) The date of the judgment entered herein by the United States Court of Appeals for the Third Circuit, affirming the decree of the District Court is May 24, 1949. The time within which to file the present petition was extended by Mr. Justice Black to and including October 21, 1949.

(b) This is a proceeding by a seaman, within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, claiming damages for a maritime tort.

(c) The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the Federal Judicial Code, and

under Article 3, Section 2, of the Constitution of the United States.

C. Reasons Relied On for Allowance of the Writ

First: The basis of the decision of the Court below is that, if there is a choice of a safe and unsafe method or place of work, then the place and method of work must be regarded as a safe as a matter of law. That decision is in direct conflict with the rule of law announced by this Court in *Socony Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, where the seaman by the exercise of a certain precaution could have avoided all danger. This Court there ruled that the place of work must be regarded as unsafe notwithstanding the fact that there was a safe method which would have eliminated the hazard; and the only effect of the failure to exercise the precaution was to invoke the comparative negligence rule. This rule has been followed from the earliest times and it has been uniformly held, under the admiralty law that the choice of an unsafe appliance or place when a safe one was available, does not defeat the right of recovery but merely reduces it under the comparative negligence rule. *Olson* v. *Flavel,* 13 Sawy. 32, 34 Fed. 477; *The Julia Fowler,* 49 Fed. 277.

Second: The effect of the decision of the Court below is to completely wipe out and prevent the application of the comparative negligence rule in any admiralty case since it may similarly be argued that but for the negligent act of the workman himself, the accident would never have occurred. This conclusion and the reasoning upon which it is based is directly opposed by the ruling of this Court in *Socony Vacuum Oil Company* v. *Smith, supra.*

Third: The ruling of the Court below is in conflict with the holding of this Court in *Baltimore and Ohio Railroad Company* v. *Baugh,* 149 U. S. 368, 37 L. Ed. 780, to the effect

that a master impliedly states to his employees that the place of work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe and if the master instead of discharging the duty himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee.

Fourth: The decision of the Court below is in conflict with the rule of law where an employer leaves the performance of his work in the hands of a middleman, reserving to himself no discretion, then the middleman's negligence is the master's negligence, *Mullan* v. *Philadelphia and Southern Mail Steamship Company,* 78 Pa. 25; *Maryland Dredging Company* v. *State of Maryland,* 262 Fed. 11; and under these circumstances the Court below should have found that the negligence of the stevedore was imputable to the respondent.

Fifth: Where the method provided for doing work has a bearing upon the safety of those employed by the master, a non-delegable duty is imposed upon the latter and it is one for the breach of which the master cannot escape liability by entrusting the performance of such a duty to an independent contractor, *Wilczynski* v. *Pennsylvania Railroad,* 90 N. J. L. 178, and the negligence of the independent contractor or his employees attaches to the employer of the injured man. *Mayor, etc.* v. *McCary,* 84 Ala. 469; *Toledo Brewing and Malting Company* v. *Bosch,* 101 Fed. 530; *The Magdaline,* 91 Fed. 798; *Griffith and Sons Co.* v. *Brooks,* 197 Fed. 723.

Sixth: The decision of the Court below is in conflict with *Seas Shipping Company* v. *Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, where this Court laid down the rule that although the longshoremen are employed by stevedoring companies who are allegedly independent contractors, there is a relation-

ship between the longshoremen and the shipowner because of the nature of the service rendered, which imposes the same duty to provide a seaworthy vessel in favor of the longshoremen as exists in favor of the ship's crew. This is upon the theory that the stevedoring employer is merely a middleman or intermediary whose primary function is to obtain the labor necessary for the ship's business. In this view, the longshoremen are in effect co-workers with the members of the crew and the shipowner should be liable for their actions as he is for the actions of the crew members.

The principles involved in this petition by far transcend the particular case here involved. The decision of the Court below, if allowed to stand, will have the effect of making a most substantial change in the maritime law. In many personal injury cases the employers have heretofore sought to mitigate their liability by urging the contributory negligence of the seamen. Under this decision the employers will now seek complete exoneration and thereby effectively nullify the comparative negligence rule. It may be assumed also that the shipowners will now argue from the decision of the Court below that they cannot be held to be negligent or that a place cannot be regarded as unsafe if it appears that the accident could have been avoided through the exercise of some precaution. The reasoning of the Court of Appeals is clearly demonstrated to be unsound in the dissenting opinion of Chief Judge Biggs who points out that the character of the place cannot be changed by anything that the seaman does or fails to do any more than a leopard can change his spots. The failure of a seaman to take certain precautions does not and cannot change the character of the place, but it does evaluate the seaman's own exercise of care which is the determining factor under the comparative negligence rule.

Not only will the decision of the Court below affect virtually every seaman's action for damages, but it will also apply to all longshoremen's cases which are likewise governed by the comparative negligence rule, and in addition, it will extend to all cases of railway employees where the same rule prevails. It will affect all cases or causes of action based on maritime torts or upon the Federal Employers' Liability Acts. Moreover, the decision below would ignore the exception to the rule of independent contractor, and under that decision an employer would be free to parcel out various phases of his work with impunity even though that work would have a bearing on the safety of his own employees.

There are two principles of paramount national importance involved in this proceeding, both of which have already been passed upon by this Court as indicated in the decisions heretofore cited. The decision of the Court of Appeals is in direct conflict with the applicable decisions of this Court, and unless this petition for certiorari is granted, it is inevitable that the ruling here will have the most disastrous effect upon the maritime law and the law applicable to railway employees.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the Seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 9561, Margaret Shields and Henry K. Shields, by his mother and next friend, Margaret Shields *v.* United States of America, War Shipping Administration; and that the Decree of the United States Court of Appeals for the Third Circuit in this case may be

reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray.

MARGARET SHIELDS and
HENRY K. SHIELDS,
By his mother and next friend,
MARGARET SHIELDS,
By ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 193a) was rendered on March 18, 1947, and is reported in 73 F. Supp. 862.

The majority opinion of the United States Court of Appeals for the Third Circuit (R. 203) was rendered on May 24, 1949; the amended dissenting opinion of Chief Judge Biggs was rendered on June 15, 1949. The majority and dissenting opinions are reported in 175 F. (2d) 203.

II

Jurisdictional Statement

A jurisdictional statement has already been set forth in the attached petition under the heading "B". In the interest of brevity, a restatement is omitted.

III

Statement of the Case

A statement of the case has been set forth in the attached petition under the heading "A". A restatement is omitted here in the interest of brevity.

IV

Specification of Errors

The Court of Appeals erred in the following respects:

First: In holding that the respondent did not fail in its duty to provide a safe place to work solely because the libellant failed to take the precaution of closing the deck valve, despite the fact that the place and method of work was otherwise unsafe and dangerous.

Second: In erroneously considering the contributory negligence of the petitioner in determining whether the respondent violated its duty under the law.

Third: In nullifying the comparative negligence rule by holding that the negligence of the petitioner exonerated the respondent from liability.

Fourth: In failing to apply the principle that an employer under the maritime law had a non-delegable duty to provide and maintain a safe place to work, which could not be delegated to an independent contractor.

Fifth: In failing to hold that the negligence of the longshoreman was imputable to the respondent because the work in which the longshoreman was engaged had a bearing on petitioner's safety.

Sixth: In failing to apply the reasoning of this Court in *Seas Shipping Co.* v. *Sieracki, supra,* to the effect that there is a relationship between the longshoremen and the shipowner and the fact that the stevedoring company, while technically the employer of the longshoremen, is nevertheless, simply an intermediary between the longshoremen and the shipowner.

V

ARGUMENT

Summary of Argument

The Court below found that the makeshift controls which were attached to the throttles of the winches and the method of operation by the longshoremen rendered the place of work unsafe and dangerous, but, since the petitioner could have eliminated the danger by closing the valve, that omission exonerated respondent from liability. It is petitioner's contention that the omission by the petitioner did not transform the character of the unsafe and dangerous place but could only invoke the comparative negligence rule. It was the respondent's act which created the hazard and if the petitioner failed for any reason to take a necessary precaution, that fact did not create the danger for that was already there, but it could only determine whether the petitioner himself acted with due care. The decision below has the effect of nullifying the comparative negligence rule and substituting the rule that contributory negligence completely bars all recovery.

It is petitioner's contention also that because the work of the longshoremen had a bearing on the safety of the seamen,

any negligence of the longshoremen was imputable to the shipowner under the doctrine that in these circumstances the employer cannot shed himself of the duty to his own employees by delegating the performance of the work to an independent contractor. Moreover, in view of the decision in *Seas Shipping Company* v. *Sieracki, supra,* the longshoremen are not to be considered merely as employees of an independent contractor, but also as having a relationship to the shipowner because of the nature of the services rendered. Petitioner accordingly makes the following contentions:

(1) Respondent violated its non-delegable duty to provide a safe place and method of operation for which it should be held liable irrespective of any contributory negligence on the part of the seaman.

(2) The negligence of the longshoreman was imputable to the shipowner because the work in which the longshoremen were engaged had a bearing on the safety of the seamen.

First Point

Respondent Violated Its Non-Delegable Duty to Provide a Safe Place and Method of Operation for Which It Should Be Held Liable Irrespective of Any Contributory Negligence on the Part of Libellant.

The law has always imposed upon employers, of both shoreworkers and maritime employees, a non-delegable duty to provide a safe place and method of operation. The rule is most strictly applied in maritime employment for the reason, as stated in "The H. A. Scandrett", 87 F. (2d) 708, that a vessel is an instrumentality full of internal hazards, aggravated if not created by the uses to which she is put, and, accordingly, under the maritime law, there is an abso-

lute obligation to provide a safe place to work and a seaworthy vessel, and this duty does not depend upon the exercise of reasonable care but is an absolute and non-delegable one. See also "The Seeandbee", 102 F. (2d) 577; *Sabine Towing Company* v. *Brennan,* 72 F. (2d) 490. In *Sutherland* v. *Buckeye Tour Cotton Oil Company,* 259 Fed. 909, the Court defines the duty as an inalienable and non-assignable obligation not to expose the servant to any unnecessary peril. The Dredge No. 15, 264 Fed. 135; *Pacific American Fisheries* v. *Hoof,* 291 Fed. 306; *Wychgl* v. *States Steamship Company,* 296 Pac. 863.

The duty to provide a safe place is not limited merely to the physical structure in which the employee performs his duties and the appliances which he uses in his work, but it extends also to the method of operation. The place of work may be entirely free from defective conditions, yet the uses to which it is put may render the work most hazardous. In the Magdaline, 91 Fed. 798, the Court said:

> "A servant may expect that his master will not surround him with dangerous agencies or expose him to their operation, whether they are in charge of the master's servants or of any independent contractor. . . ."

The decision of the Court below would completely nullify that rule in any case where the employee's contributory negligence may be deemed to play any part. The Court of Appeals held that although the place was rendered unsafe by the makeshift controls and the method of operation adopted by the longshoremen, the petitioner could nevertheless have avoided the accident had he taken the precaution of closing the deck valve. The Court thus overlooked completely the fact that the respondent had created a hazard and an unsafe condition in the first instance and it is fallacious to say that the character of that condition changes

simply because of something the libellant might have done for his own protection. The situation is comparable to those cases where there is a choice between a safe and unsafe appliance or method of doing the work and the employee chooses the unsafe one. In those cases the courts of admiralty have consistently held that the shipowner must be deemed in violation of his duty and the only effect of the seaman's action in choosing the unsafe means or appliance is to invoke the comparative negligence rule.

An analogous incident occurred in "The Explorer", 20 Fed. 135 (1884) where the seaman, while proceeding to the hold of the vessel, passed close to the winch when it was suddenly set in motion and his left hand was caught in the flywheel. The evidence showed that there should have been a guard around the flywheel, but it also appeared that the seaman had no business using the path he had chosen but should have followed "a safer, though more roundabout way of reaching the hold". The Court held the shipowner liable notwithstanding the fact that the accident could have been avoided had the safe route been used. The Court held that the fact that the seaman chose the unsafe route when a safe one was available, did not change the character of the unsafe place caused by the unguarded flywheel, but had the effect only of reducing the damages under the comparative negligence rule.

The case of *Olson* v. *Flavel*, 34 Fed. 477 (1888) also provides an excellent analogy. There the mate used a wheelbarrow to transport coal from the dock to the hold of the vessel. He lost his balance because of an insecurity caused by a loose handle on the barrow, which was known to the mate. It appeared that there was a coal chute which could have been used with complete safety to load the coal aboard. The same contention was made there which the Court below adopted in the instant case, as follows:

"The third point made in support of this defense is that the mate had the choice of methods in putting the coal on board, and that, having adopted the dangerous one, he was guilty of negligence, and must bear the consequence. In other words, he might have used the chute, or constructed a gangway of greater width out of the plank at his service, on the wharf; and, if the barrows were out of order, he might have informed the master of the fact, so that others could have been obtained.

* * * * * * *

"I do not think there was any negligence on the part of the libelant in the use of these barrows, so far as their condition is concerned. But I do think it was dangerous to use them on this narrow plank at so great a distance above the deck.

* * * * * * *

"On the whole, my judgment is that the libelant is not blameless in this matter. He should have put the coal on with the chute or constructed a safer gangway to wheel on."

The Court, however, refused to dismiss the libel despite that negligence of the libellant and applied the comparative negligence rule, as follows:

"This is the first time the question has been made in this court, and I feel justified, in the light of the authorities cited, to follow the leading of my own judgment, and hold that contributory negligence is not a bar to a suit in admiralty, for damages arising from a personal injury. For whatever may be said by the sages of the common law, about the difficulty in such cases of determining 'whose wrong-doing weighed most in the compound that occasioned the mischief,' it is not just to leave a seaman to suffer, without redress, all the consequences of an injury caused by the fault of his employers as well as his own."

In the "Frank and Willie", 45 Fed. 494, a seaman was injured by the falling of a stack of timbers negligently piled. Although the accident could have been avoided by proper handling, the Court considered this factor only in mitigation of damages.

The same rule was followed in "The Julia Fowler", 49 Fed. 277, where the choice by a seaman of an unsafe appliance was held not to bar recovery but only called for the application of the comparative negligence rule.

In *Storgard* v. *France and Canada Steamship Corporation,* 263 Fed. 545, cert. den. 252 U. S. 585, a seaman's hand was injured because of the worn condition of a bolt on the mast. The lower court charged the jury that if the seaman knew or should have known of the defective condition but nevertheless put his hand on it, he was not entitled to recover. The Court of Appeals reversed, holding that even though the accident might have been avoided, any negligence on the part of the seaman could not defeat the recovery but could only mitigate the damages.

The leading case on the subject and squarely on the point, is *Socony Vacuum Oil Company* v. *Smith,* 305 U. S. 424, 83 L. Ed. 265. In that case an oiler stepped up on a plate which he knew to be defective, in order to test a bearing in the engine room by feeling it with his hand. The defective plate gave way causing him to fall and sustain injury. The evidence disclosed that there was another way to feel and test the bearing which was entirely safe and did not require the use of the defective step, and which was "the usual and only appropriate way to examine the bearing" (p. 427). At the trial of the case, the defendant requested the Court to charge the jury that "if respondent (seaman) could have performed his duty without the use of the defective step, he assumed the risk of injury from it." (p. 425.) The Court refused this

request, but charged instead, that there was no assumption of risk in admiralty, and if the seaman knowingly chose an unsafe method when a safe one was available, the seaman would, nevertheless, be entitled to damages but subject to reduction under the comparative negligence rule in admiralty. On certiorari, the Supreme Court pointed out that while the contention of the shipowner might be applicable under the common law, it had no place in admiralty, and sustained the conclusion and reasoning of the lower Court, as follows (p. 432):

> "* * * The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in Olson *v.* Flavel (D. C.), 13 Sawy. 232, 34 F. 477, supra, and The Julia Fowler (D. C.) 49 F. 277, supra, where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper basis for a substantial reduction of damages because of the negligence of the choice. In the Julia Fowler, supra, the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.
>
> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman *who makes use of*

*a defective appliance knowing that a safe one is available. * * *"*

This rule is peculiarly applicable to the facts in the instant case and is in direct conflict with the reasoning and decision of the Court below. It is in order at this point to briefly review the factual situation in the light of the Supreme Court's decision.

In the manufacture of the winch, the throttle and brake were located at the rear and it was intended that each winch should be operated by one man. (R. 61a). Under the general practice, each winchman operated the controls, (the throttle and brake) in accordance with signals from the signalman who was stationed in front of the winches at the hatch (R. 63a). Under this arrangement each winchman had the winch in front of him and could clearly see the oiler working on the winches. (The winches had to be oiled about five times a day while they were in operation. (R. 9a)). As heretofore stated, there were three valves which regulated the steam to the winch, one was located in the engine room, the second was on deck, and the third was at the winch and was controlled by the throttle. If the winch operator were at his post at the throttle and brake, the oiler could not be in danger because he would be in full view of the operator, who alone had control of the winch.

Under the makeshift arrangement which was employed by the longshoremen and acquiesced in by the respondent, there was a wooden extension attached to each throttle and extended from the outboard side of the winch toward the center between the two winches and thence in the form of an "L", forward, to the hatch. This arrangement enabled one man to stand between and grip both extensions and look down in the hatch at the same time. He was thus doing the work of three men, since he could

handle both winches and he no longer needed the signalman to direct him from the hatch. In that position, however, he did not have access to the brake and when he wanted to stop the forward motion of the winch he could only do so by reversing the gears so that the wheel would revolve the other way. When in position to operate these controls, his back was to the winches and he could not see the oiler working on them. It is thus understandable how the operator could easily have forgotten the presence of the oiler in the press of his own and extra duties, and in the position where he could not see the oiler unless he turned around. It was the kind of situation which practically invited and lent itself to the happening of an accident.

The hazard was further increased by the fact that the brake was not available to the winchman under the existing arrangement. This meant that the operator could not stop the flywheel which continues to revolve of its own momentum even after the steam was shut off, which is precisely what happened in the instant case. The flywheel was still revolving even after petitioner had succeeded in extricating his mangled hands. Had the brake been available and applied, it is most probable that the injury would not have been so severe, and perhaps the amputation of the hand avoided.

Under these circumstances, the place of work was rendered unsafe by the method of operation employed by the stevedores. The fact that the libellant may have had the right to close the deck valve himself[1] does not alter the fact that the situation was a hazardous one, and his failure to do so does not operate to relieve the respondent of its

[1] While the petitioner admitted he had the right to close the valve, the record shows that it was the customary function and duty of the longshoremen to open and close the deck valve and not that of the oiler (R. 62, 63, 64, 65).

negligence, but simply makes the libellant contributorily negligent, calling for the application of the comparative negligence rule.

Chief Judge Biggs, in his dissenting opinion clearly summarized the case as follows: (R. 207-210)

> "The winches had been equipped by the stevedoring company, an independent contractor, with wooden extensions which enabled the winchman, an employee of the stevedoring company, to operate two winches either simultaneously or separately. This arrangement necessitated the winchman having his back to Shields who, when he was injured, was oiling one of the winches, and the arrangement also rendered it impossible for the winchman to reach the brake which, if applied, could have stopped the rotation of the flywheel instantly.
>
> "Normally also there would have been a separate operator for each winch and the operator could have observed Shields' dangerous act, would not have turned steam into the winch and could have reached the brake. The method or means of operating the winch was a dangerous one, as the court below found, and did in fact subject Shields to hazard unless he made use of the valve on the winch to turn off the steam from it as he should have done.
>
> * * * * * * *
>
> "The United States contends, and this court finds, as did the court below, that by supplying a means to Shields, *viz.*, the steam valve on the winch, whereby he could have turned off the steam and rendered the oiling operation absolutely safe, it fulfilled its duty to Shields. I cannot agree. That Shields was negligent is clear *but the shipowner in the exercise of its nondelegable duty was also negligent.* The negligence of Shields and the negligence of the shipowner concurred in causing the accident. *I cannot conclude that by giving Shields a means, the steam valve, by the employment of which he could have rendered the oil-*

ing operation safe, the shipowner insulated itself from the result of its own negligence.

"Shields chose a dangerous method of proceeding with the oiling when he could have elected a safe method. *But the negligence of a seaman, however gross, will not bar a recovery by him but goes only to the mitigation of damages.* Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 431."

The majority opinion would insulate the shipowner from all liability upon an erroneous view of the law that where there is an opportunity afforded to avoid the accident, the shipowner cannot be held negligent. Because this view is in direct conflict with the established doctrines enunciated by this Court, this case clearly calls for a review by this Court.

SECOND POINT

The Negligence of the Longshoremen Is Imputable to the Shipowner Because the Work of the Longshoremen Had a Bearing on the Safety of the Ship's Crew.

As a general rule, where a person engages an independent contractor and uses reasonable care in the selection thereof, he may not be held liable for the torts committed by the independent contractor in the performance of the work. There is, however, a well defined exception to this rule where the work to be performed has in it an element of danger, under which circumstances the party letting the work may not divest himself of liability because the law imputes to him the negligence of the independent contractor or his agents. The principle involved is that a positive personal duty cannot be delegated to an agent or contractor and the obligation in such cases is to do the thing required and not merely to employ another to do it. *Toledo Brewing and Malting Company* v. *Bosch,* 101 Fed. 530; *Jacob Doll & Sons* v. *Ribetti,* 203 Fed. 593; *St. Paul Water*

Company v. *Ware,* 16 Wallace 566, 21 L. Ed. 485; *American Pacific Whaling Company* v. *Kristensen,* 93 F. (2d) 17. While the rule is applied most frequently in connection with cases arising out of the master and servant relationship, it has a much broader scope. In *Doll* v. *Ribetti, supra,* the owner of a building engaged an independent contractor to wash the windows of the building and while engaged in the performance of that work, one of the window cleaners fell and struck a pedestrian on the sidewalk below. The sole question raised on appeal on a verdict in favor of the plaintiff against the owner of the building, related to the legal responsibility of the defendant for the negligence of the independent contractor. The Court held that as an occupier of the premises, the law imposed upon him a positive duty to those using the highway to use all reasonable care, and because there was an element of danger involved in the work undertaken by the independent contractor, the negligence of the latter was held to be imputable to the occupier of the building.

In *St. Paul Water Company* v. *Ware, supra,* the municipality entered into a contract with an independent contractor for the latter to lay water pipes, to keep the work properly guarded, and to assume responsibility for all damages. A third person was injured through the negligence of the independent contractor and in the suit against the municipality, the Supreme Court held the latter responsible for the negligence of the independent contractor, as follows:

> "Where a person or corporation is engaged in a work in the ordinary doing of which a nuisance necessarily occurs, the party is liable for any injury that may result to third parties from carelessness or negligence even though the work may be done by a contractor."

This exception to the rule of non-liability for the negligence of an independent contractor finds even greater

application in cases arising out of the master and servant relationship, and particularly so in the maritime industry. In *American Pacific Whaling Company* v. *Kristensen, supra,* a seaman was fatally injured on a whaling boat when a defective gun mount broke on discharge of the gun. In the suit by the administratrix, it was contended that the shipowner was liable for negligently furnishing a defective gun stem. Defendant alleged that it had turned the vessel over to a reputable shipyard to repair the gun and the negligence, if any, was that of the shipyard. The District Court refused an instruction that the defendant could not be held liable if it used reasonable care in the selection of an independent contractor and this refusal was assigned as error on appeal. In holding that the doctrine of independent contractor did not apply, the Court said:

> "Does the Doctrine of Independent Contractor Apply to This Case?
>
> "The defendant assigns as error the court's refusal to instruct the jury as follows: 'If you find that the defendant in selecting the Lake Washington Shipyard to repair the gun complained of in this case, used due diligence, then you are instructed that your verdict in this case must be for the defendant, regardless of whether or not you find that the Lake Washington Shipyard used due diligence under the circumstances in performing the work on the gun.'
>
> "The refused instruction went much too far, even though we should agree that the evidence is all one way that the shipyard is an independent contractor, which we do not. It eliminated entirely the exception to the rule, i.e., that the employer is not relieved from imputation of negligence in cases presenting the principle of 'dangerous instrumentalities'. If the work done by an independent contractor has in it an inherent element of danger, and, through negligence of the contractor, proper provision has not been taken to guard against such danger, such negligence is imputed to the

employer. *If the work, from its nature, is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor, if the latter does not take these precautions.*"

A similar situation occurred in *Wilczynski* v. *Pennsylvania Railroad,* 90 N. J. L. 178, where the railroad entered into a contract with a barge company to transport certain steel beams. The railroad deposited the beams on the pier and the lighter then loaded the steel beams by means of a huge crane. The loading operation was done under the sole control of the barge captain. After a number of the girders had been loaded aboard the barge and while the crane was hoisting one of the beams off the pier, the vessel tilted, causing one of the girders on the barge to be dislodged and it struck and killed one of the employees of the railroad. Suit was instituted against the railroad, as employer, and it was defended upon the ground that the negligence was that of an independent contractor, the barge captain, and that therefore the railroad must be absolved under the independent contractor doctrine. The Court of Errors and Appeals rejected this contention of the railroad, holding that the case called for the exception to the rule because the work of the independent contractor had a bearing on the safety of the railroad employees, under which circumstances the negligence of the independent contractor was imputable to the railroad. Said the Court:

". . . Where, however, the method provided for doing the work, or a part of it, *has a direct bearing upon the safety of those employed in and about such work,* a duty arises on the part of the master of such employees to use reasonable care to provide a safe method of doing the work, or at least to avoid a dangerous method if the exercise of reasonable care would

produce that result. The state and federal decisions are collected in the American Digest, under key number Master and Servant 130.

"This duty of the master, like the duty to use reasonable care to provide a safe place of work, with which it is closely assimilated in legal principle, is one that the master owes to his servants, and hence is one *for the breach of which the master cannot escape liability by entrusting the performance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants.*

• • • • • • •

"Inasmuch as the defendant could not avoid this duty by delegating the performance of it to the captain of the barge, *or by passively permitting it to be performed by him,* it was immaterial upon the questions raised by the motions to nonsuit and to direct a verdict, what relation, if any, existed between the lighterage company and the Pennsylvania Railroad Company, or between the servants employed by the one and those employed by the other. *For as the duty of the defendant to its servants could not be escaped by the delegation of its performance, neither could it be avoided by ordering them to work at an employment over which the defendant in fact exercised no control. The duty of the master followed the employment engaged in by the servant under the order of the master. The abandonment of a duty or the abdication of the power to perform it, does not discharge the duty or cancel the master's liability for its non-performance.* . . ."

Note how peculiarly applicable that reasoning is to the facts in the case at bar, where the respondent attached its own employee to the very work in which the longshoremen were engaged.

An analogous situation arose in the case of *The Magdaline,* 91 Fed. 798, where the libellant was employed aboard the vessel to assist in shifting ballast in the hold. At the same time, an independent contractor was working on the

top deck and members of the ship's crew were working on a lower 'tween deck. While the libellant was wheeling a load of sand in the lower hold, he was injured by a timber which had dropped from one of the decks above. In the suit against the vessel it was contended that the evidence did not show whether the timber had been dropped by members of the crew on the 'tween deck or by servants of the independent contractor on the top deck, and it was argued from this that liability could not be fastened upon the ship. The Court, however, ruled that it was immaterial whether the injuries were due to the negligence of the ship's crew or to the servants of the independent contractor because the nature of the work was such that it had a bearing on the safety of the employees working below, under which circumstances the vessel was liable in either event, as follows:

> ". . . A master may not place his servant at a work made dangerous by the nature of the work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of any independent contractor. . . ."

The same principle was followed by the Pennsylvania Supreme Court in *Mullan* v. *Philadelphia and Southern Mail Steamship Company*, 78 Pa. 25, where a draft of cargo, while being hoisted out of the hold of a ship, slipped out of the sling because it was improperly secured and caused injury to the claimant below. It was contended by the defendant that the accident was due to the negligence of the

independent contractor in improperly securing the load. The Court held that defense to be inapplicable as follows:

> "Where the employer leaves everything in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the master's negligence, sec. 229; Grizzle v. Frost, 3 Foster & Finlayson 622. The principle that the master is exempt from responsibility to the servant for injuries received from the ordinary dangers of his employment, including the negligence of his fellow servants, is too deeply imbedded in our law to be disturbed. But where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master should be held answerable. *The negligence of the agent, with such powers, becomes the negligence of the master.*

A comparable situation also arose in *Maryland Dredging Company* v. *State of Maryland,* 262 Fed. 11, where an employer of stevedores engaged the owner of a launch to transport the men down the river to the job. Because of the negligent navigation of the vessel by the launch owner, one of the stevedores was thrown overboard and drowned. The suit against the employer was defended upon the ground that the death was due to the negligence of the independent contractor. In holding that this fact did not absolve the employer because the negligence of the independent contractor was imputable to him, the Court held:

> "We are unable to agree that the Stevedore Company can escape the consequences of the negligence of the master of the launch on the ground that its owner was employed as an independent contractor. Doubtless

the owner of the boat was an independent contractor as between himself and the Stevedore Company, and in his relation to the general public. For any negligence the consequences of which would fall on the Stevedore Company he would be liable over the Stevedore Company. For any injury inflicted by his negligence on the outside public, such for example as an injury to another boat by collision, the owner of the launch as an independent contractor, would be liable to the exemption of the Stevedore Company. Sturgis v. Boyer, et al., 24 How. 110, 16 L. Ed. 591; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600; Casemont v. Brown, 148 U. S. 615; 13 Sup. Ct. 672; 37 L. Ed. 582; Wilmington Railway Bridge Co. v. Franco-Ottoman Shipping Co., 259 Fed. 166, — C. C. A. —, fourth Circuit, filed January 7, 1919.

"But the Stevedore Company having contracted to convey its employees to their work, its obligation to use reasonable care in the carriage is *implied* as a part of the contract; *and it cannot shift this obligation to another by an independent contract to which the employees were not parties and to which they did not assent.*"

The principle of law to be extracted from these cases is, that where an employer engages an independent contractor to perform a job which has an element of danger to, or has a bearing on the safety of the servants of the employer, then the latter must be charged with the responsibility for the actions of the independent contractor, even though he does not reserve to himself any right of control over the independent contractor, and the negligence of the independent contractor under those circumstances is imputable to the employer.

The Courts below are in agreement, that, entirely aside of any other factor, the longshoreman was negligent in prematurely starting the winch. Under the doctrine here

urged, that negligence is imputable to the shipowner as a matter of law. The Court of Appeals below, by its decision, may be assumed to have rejected the doctrine from any application in this case, but failed to make any comment to indicate the basis for the ruling, although the point was vigorously argued. The learned District Judge did assign a reason for denying the rule's application, as follows: (R. 194a)

> "There is no such practical need or policy which requires that the shipowner be held responsible for the negligence or misconduct of such longshoremen, not employed by him but by an independent contractor and doing work over which he has little if any control."

We submit that this reasoning represents a misunderstanding of the law. The rule which we urge here assumes first of all, that the agents of the independent contractor *are not in the employ of the shipowner* and that the latter has *no control whatsoever* over the work entrusted to the independent contractor. Moreover, the statement that there is no practical need or policy for the shipowner to be held responsible in these circumstances, completely overlooks the real criteria for the very existence of the rule, namely, that there shall be an element of danger involved or that the work shall have a bearing on the safety of the employee. These are the criteria which determine the applicability of the rule and not some other "practical need or policy". Parenthetically, it may be stated that there is in fact a great practical need and policy for the rule which requires a shipowner to be responsible for the negligence of the longshoremen. Generally speaking, the work of the longshoremen involves considerable danger to and has a substantial bearing on the safety of the ship's crew even when they are not actively engaged in working with the longshoremen. The operation of the winches which causes the cables to thrash

around the decks and the hoisting and swinging of the booms with drafts of cargo, demonstrate that the work is replete with danger to the members of the crew whose activities are limited to the confines of the vessel. In the instant case, the petitioner was assigned to work with the longshoremen to keep the winches lubricated while they were being operated by the longshoremen. His duties thus required him to be in the very center of the longshoremen's activities, and attached him to the specific work in which they were engaged. Under these circumstances, it is less than realistic to say that there was no practical need for a policy to hold the shipowner liable for the conduct of the men with whom the shipowner had surrounded petitioner.

What has been said is based upon the assumption that there is no relationship between the longshoremen and the shipowner. It is pertinent to note that this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, held that while there is no contractual relationship between them, there is nevertheless an implied relationship which attaches by virtue of the nature of the services rendered. Because of that relationship, the shipowner owes the same duty to the longshoremen as he does to the crew members, to provide a safe and seaworthy vessel. This conclusion was drawn from the premise that the stevedoring contractor, although the direct employer of the longshoremen is realistically an intermediary between the longshoremen and the shipowner. In that connection this Court said:

> "On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, *but extends to those who render it with his consent or by his arrangement.* All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner *should not be free to nullify it by parcelling out his operations to intermediary em-*

ployers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, *whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. . . .*"

The circumstances are thus much less favorable to the shipowner than we have assumed for the purpose of this argument. It may well be argued from the reasoning in the *Sieracki* case that the relationship between the longshoremen and the shipowner may impose a liability upon the latter under the doctrine of respondeat superior. The principle of law upon which we rely, however, does not require any such relationship, but assumes on the contrary, that the shipowner has no relationship to the longshoremen and exercises no control whatsoever over them. The Court of Appeals below either overlooked or declined to follow the established rule of law which was clearly applicable to the facts of this case, and upon this ground also this Court should exercise its supervisory powers.

Conclusion

The Court of Appeals has rendered a decision which is in direct conflict with the maritime law as announced by the applicable decisions of this Court and the courts of the various circuits. The decision works material injury to the characteristic features of the maritime law, the law applicable to railway employees and will affect every suit by seamen, longshoremen and railroad workers in any case where the defense of contributory negligence may be raised

or where the doctrine of independent contractor may be advanced.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and, therefore, that a Writ of Certiorari should be granted to the end that the judgment below may be ultimately reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN.

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